

STATEMENT OF BRIAN E. FINCH, ESQ.
BEFORE THE
U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON
HOMELAND SECURITY
SUBCOMMITTEE ON MANAGEMENT, INTEGRATION
AND OVERSIGHT
AND
SUBCOMMITTEE ON EMERGENCY PREPAREDNESS,
SCIENCE, AND TECHNOLOGY
REGARDING
“HELPING BUSINESSES PROTECT THE HOMELAND: IS
THE DEPARTMENT OF HOMELAND SECURITY
EFFECTIVELY IMPLEMENTING THE SAFETY ACT?”

SEPTEMBER 13, 2006

Chairman Rogers, Chairman Reichert, Ranking Member Meek, Ranking Member Pascrell, and other distinguished members of the Subcommittees, it is an honor to appear before you today to discuss my experiences in assisting applicants in obtaining liability protections under the Support Anti-Terrorism By Fostering Effective Technology Act of 2002 (the SAFETY Act).

My name is Brian Finch, and I am counsel at the law firm Dickstein Shapiro LLP, where I also serve as the head of the firm's Homeland Security Practice Group. While I am here in my personal capacity, I am delighted to share with you my many experiences over the past three years with the SAFETY Act. It has not always been an easy process, and there have been times of great frustration for both myself and the companies that I have represented. However, it is my firm belief that the SAFETY Act implementation process has been steadily improving and that the Department of Homeland Security has made some great strides over the past few years to make the process easier and more efficient. Given the many challenges that DHS faces on a daily basis, it is my opinion that DHS has given an extraordinary amount of attention to improving the SAFETY Act process, and that it should ultimately be commended for its efforts.

I have been involved in the SAFETY Act process for the better part of the last three years. Over that time frame I have helped to draft dozens of SAFETY Act applications, including the very first two applications to receive Certification and Designation under the SAFETY Act. I have helped prepare a wide variety of applications. I have for instance helped draft applications for non-intrusive detection devices, explosive detection equipment, decision support software, maintenance services, systems integration services, vaccines, and vulnerability assessment methodologies to name but a few.

The size of companies for which I have provided SAFETY Act assistance has ranged from the exceptionally large to small ventures generating just a few million dollars annually. I am currently working with well over a dozen companies that have applications in various stages of review, and those companies range from large defense conglomerates to smaller security contractors, as well as trade associations.

Experiences With SAFETY Act Application Review Procedures

With that wide range of clients and applications, I have encountered any number of scenarios in the SAFETY Act application process. My involvement typically starts with the decision making process on what applications to submit all the way through to counseling on ways to utilize the receipt of a SAFETY Act approval. I have handled some very straightforward applications that passed through review with relative ease, and I have been involved in some applications that entailed painstaking reviews and immense amounts of effort. This has allowed to me see both patterns and aberrations in the review process.

In that vein, I would like to start with my basic views about the SAFETY Act application process. As I inform all potential applicants, the process will involve some significant thought and effort as we must present to the Department a thorough overview of the technology or service in question. Applicants have a responsibility to present evidence demonstrating that their technology is safe, effective, and has a usefulness as anti-terror technology. At the same time, they must be aware that the Department has a responsibility to conduct a fair and meaningful

review. DHS must have at its disposal sufficient information to make a determination that technology or service at issue is in fact safe, effective, and useful.

In my experience, what constitutes “sufficient information” has over the past three years varied significantly and been somewhat of a mystery. Some applications have moved swiftly through the review process with dozens of pages of documentation. Others have submitted literally thousands of pages of backup documentation, and yet applicants will receive numerous additional requests for information. These additional requests for information have often led to applications being held for several months beyond the 150 day decision timeframe.

The applicants who have run into the continued requests for information or have had their applications under review for months beyond the prescribed timeline are the ones that typically talk about the SAFETY Act process being akin to a “mini-FDA” process. Based on my work, I can say that the application review process has at times been unnecessarily involved. While the majority of my application experiences have not been negative, there certainly have been occasions where the level of documentation requested and the delays in the process could be deemed excessive. For example, one application informed DHS that guard dogs - including those used by the applicant - could detect over 20,000 different smells. In response, DHS asked us to provide proof of that statement, including a list of the 20,000 smells. That seemed excessive.

Given the number of applications where I have been involved, I have grown accustomed to those types of information requests and can warn applicants about the level of detail that must be provided. Clients who are not used to that experience, however, are more than a little surprised and frankly disappointed by how much information must be provided. Applicants are always quite willing to provide the information needed as they are committed to successfully pursuing coverage, but at the same time they are baffled as to why DHS would demand so much information. That, if anything, has been the source of much consternation.

Part of that distress has come about in part because at times there seems to be a significant disconnect between the senior management of DHS and the implementation staff. While DHS leadership has always seemed to have grasped the importance of a smooth running SAFETY Act application process, that message seems not to always flow down consistently to the implementers and the reviewers. Instead of a unified theme of quick and efficient reviews of applications one is left with the impression that review staff are more committed to microscopic reviews of applications, leading to reviews getting bogged by details of an application. This results in unnecessary delays and frustration at the process.

Again, this does not represent the majority of my experiences. Indeed for most applications I have encountered personnel at all levels that are committed to the success of the SAFETY Act program and who would like to see applications succeed. I generally applaud the efforts of the DHS staff at all levels. However, I would be remiss if I did not mention that the heightened scrutiny of applications has occurred on more than one occasion and has led some applicants to express significant frustrations.

Despite the less than perfect experiences, I have found that an ever increasing number of companies are willing to pursue SAFETY Act protections. While the pace of approvals was generally considered to be slow, the recent uptick in the number of approved technologies has galvanized a number of companies to start the process. Even more important is the fact that we

are starting to see an increasing number of *customers* who have decided that potential vendors should have either obtained or be seeking SAFETY Act approval. The fact that customers have recognized that SAFETY Act coverage is a valuable tool and accordingly believe it that they should be using SAFETY Act approved products and/or services is a strong indicator that the process is working. If there were no value in it, no would even think twice about it – particularly on the customer side.

I should also note that when the SAFETY Act was first brought online, a strong misperception existed that it would apply only to cutting edge “widgets,” and not existing solutions or services generally. This misperception, which existed despite the best efforts of DHS, in my opinion contributed to the relatively small number of applicants at the beginning of the process.

To its credit, DHS has invested significant energy to dispel those myths. A significant number of approvals have been issued to service providers, and issuing those approvals has proven to be the best remedy for any concerns about the potential breadth of approvals that can be issued. And I would like to particularly note that DHS has gone out of its way to help ensure that applications encompassing less obvious but vitally important anti-terror services received a fair review.

These applications, which include engineering services, security guidelines, and professional certification programs, may not have the visceral appeal of an explosive trace detection device or an anthrax detector, but they play just as an important part of the nation’s anti-terror efforts as any other widget or service. DHS should be lauded for such approvals because it will make it easier to attract similar innovative applications.

THE FINAL RULE AND REVISED APPLICATION KIT

Ever since the Interim Final Rule and the initial Application Kit were released in the Fall of 2003, industry and commentators have been pointing out its flaws and asking when they would be supplemented or replaced. After years of questions and promises of “imminent” release, DHS finally released both the Final Rule and a Revised Application Kit this last summer.

DHS itself admits these documents are not the final say on all things SAFETY Act, which is both appropriate and welcome. Yet before the inevitable discussion begins about how both the Final Rule and the new Kit go far enough, I would like to note to the Committees what I believe are several very welcome new developments. While both the Final Rule and the Kit contain many improvements, I believe the following are especially noteworthy:

- **Pre-Qualification of Procurements:** Since the SAFETY Act was enacted, potential applicants have been searching for ways to better ensure a guarantee that if they submitted a bid on a particular procurement they would obtain SAFETY Act coverage. Many procurement officials (particularly those outside of DHS), in light of the lack of an official vehicle for doing so, could do nothing more than offer to support an applicant’s package to do DHS. While such support is always welcome, no one had the confidence that it would be sufficient to ensure a particular application’s success. Under the Final Rule, customers are now armed with a way to help ensure that potential vendors will in fact receive SAFETY Act coverage. The Final Rule spells out a “Pre-Qualification Designation Notice” process that should be warmly welcomed. Agencies now have a method by which they can submit their potential procurement to DHS for review. If DHS finds that the potential procurement would merit SAFETY Act approval, vendors who are

ultimately chosen to provide the specified technology will receive an expedited review, either affirmatively or presumptively be deemed to satisfy the criteria for a SAFETY Act Designation, and can submit a streamlined application. This is truly a step forward, as now procuring agencies are armed with a methodology that will allow them to guarantee SAFETY Act approval. That in turn should help bring forward more potential vendors, increasing choice and the potential that the proper technology will be deployed.

- **Developmental Testing & Evaluation Designations:** In the development phase of any technology, including those to be used to combat terrorism, it is quite normal for an unfinished or unproven product to be field tested or deployed in limited circumstances. Such preliminary deployments are necessary in order to finalize testing or verify the value of the technology. In the context of anti-terror technologies such deployments can be extremely problematic given that terrorist activity could realistically occur during the deployment. SAFETY Act protections would obviously be ideal to limit liability concerns, but the Interim Final Rule did not contemplate offering protections for such deployments. The Final Rule has significantly addressed those concerns, however, by creating a heretofore unavailable liability protection method. DHS has made available a limited set of SAFETY Act protections for technologies that are being developed, tested, evaluated, modified or are otherwise being prepared for deployment. The SAFETY Act protections offered under a Developmental Testing & Evaluation (or DT&E) Designation will last for no more than 36 months, shall apply only to limited deployments, and could have other restrictions imposed as determined by the Under Secretary for Science & Technology. While a DT&E Designation is far more limited than a full SAFETY Act Designation or Certification, it provides a measure of liability protection that otherwise was not available. Given that many technologies need an operational deployment in order to be finalized, this category of application will allow such deployments to proceed without fear of crushing liability.
- **Changes to the Application Kit:** One of the more regularly maligned facets of the process has been the SAFETY Act Application Kit. The initial version of the Kit was criticized by many as confusing, overly repetitive, and lacking guidance on what it would take to receive an “expedited review”. The new Kit addresses many of those concerns. First and foremost, DHS has drastically toned down the “Pre-Application” section of the Kit. Applicants no longer have to fill out a confusing form that often resulted in grand misconceptions about a particular technology. DHS now makes clear that a Pre-Application consultation is strictly voluntary, and has gone to great lengths to make that process easier for potential applicants to undertake. DHS has also added a section asking directly what entities have been procuring the technology in question. Importantly included in that section are categories for commercial organizations and foreign governments. That inclusion recognizes the importance of anti-terror deployments not only to Federal, state and local governments but also to foreign governments and commercial entities, all of whom are vital partners in the fight against terrorism. DHS has also gone to great lengths to provide a better vehicle for requesting an expedited review. A specific section has been set up to address this issue, which should make it easier for an applicant to explain what pressing deadlines they are facing and why DHS should issue a decision in less time than typically required. In that vein DHS has also reduced the potential review time from 150 to 120 days.

While there are many other changes in the Final Rule and Application Kit that could be discussed, it should be sufficient to note that the Department has gone a long way to address many of the concerns expressed by applicants. There will always be room for improvement, as discussed in part below, but one should be absolutely clear that the Final Rule and Kit represent significant steps forward and that the Department should be applauded for its actions.

SUGGESTIONS FOR IMPROVEMENTS TO THE SAFETY ACT PROCESS

Even in light of the great strides taken by the Department, there are other steps it could undertake in order to ensure that the SAFETY Act realizes its full potential. An overarching goal for the Department should be to create a robust and user friendly process that is well known inside and outside of the Department, and whose use is considered a high priority by all entities. To that end, I would suggest the following operational steps in order to better implement the SAFETY Act.

- **Increased Oversight By Science & Technology Leadership**

From the moment he was sworn in, Secretary Chertoff has made clear that getting the SAFETY Act right was one of highest priorities. In numerous speeches the Secretary has underscored the importance of the Act and his commitment to improving the process. As a regular participant in the SAFETY Act process, his dedication to the success of the program has been plainly evident. This commitment has also been demonstrated by a number of other DHS offices, including most prominently the General Counsel's office.

However, as we are all aware, the SAFETY Act is not the only priority for the Department. The very mission of the Department requires it to be focused on any number of emergencies or emerging threats at any given point. To a large extent that has resulted in an unfortunately reality where the Department operates "out of the in-box," reacting to the crisis of the day. Because of that reality, it is unrealistic to expect that senior staff in the General Counsel's Office or in the Secretary's Office can exert significant oversight on the SAFETY Act program.

A more appropriate level of oversight can be exerted however by the Science & Technology Directorate, which is entrusted with administering the SAFETY Act. The new S&T Under Secretary, Admiral Jay Cohen, is in a prime position to strike a balance between the high level of policy direction and operational supervision. Under Secretary Cohen has at his disposal the personnel necessary to ensure that the policy directives of the Department are properly implemented by the Office of SAFETY Act Implementation (OSAI), including any contractor who conducts a review. To date, no one person has been able to fill such a role, with the result being an unfortunate disconnect between policy directives and implementation. In order to bridge that gap, I would urge the Under Secretary to assign a senior member of his S&T staff the responsibility of being a kind of "SAFETY Act Ombudsman," someone to who has access to and can regularly interact with policy makers within the Department, but at the same time has the ability to interact regularly with OSAI to ensure that policy decisions are translated into action. The creation of such a position, potentially within the Under Secretary's immediate office, will significantly reduce the communication disconnect that has, frankly, hindered progress for the SAFETY Act program.

- **Better utilization of the SAFETY Act inside and outside of the Federal government**

Homeland security as a mission is not the sole responsibility of DHS. Numerous other members of the Federal family, ranging from the Department of Defense to the Department of Health and Human Services as well as the Department of Agriculture, all play a vital role in defending the nation from terrorist threats. Because of the shared responsibilities, each department procures its own anti-terror goods and services and also helps promote their use on a state and local level as well as in the private sector.

For those and many other reasons, DHS should do its part to help ensure that other Federal agencies understand the SAFETY Act and how it can be best utilized. This can take many forms, including encouraging other Federal agencies to pre-qualify procurements for SAFETY Act approval. For example, it makes plain sense to have the Department of Defense utilize the SAFETY Act when procuring technologies to conduct force protection operations at its facilities. Similarly the Department of Health and Human Services should not be shy about promoting the use of the SAFETY Act when procuring technologies and services that will be used when a mass casualty event occurs. DHS should work with other Federal agencies to encourage the use of SAFETY Act approved products by private sector partners. This could take the form, for instance, of the Department of Agriculture encouraging companies to use SAFETY Act certified companies to perform security services in order to help reduce the risk of agro-terrorism. The bottom line is that DHS should work actively with other agencies involved in homeland security to increase their knowledge and utilization of the SAFETY Act.

One vehicle in particular that DHS should use to promote the use of the SAFETY Act outside of the Department itself is the National Infrastructure Protection Plan (the “NIPP”). The recently released final version of the NIPP explicitly encouraged the use of the SAFETY Act approved products to protect critical infrastructure and key resources. This was a very smart move by the Department and should be utilized as fully as possible. Given that the NIPP is the DHS blueprint for not only protecting the nation’s critical infrastructure but also partnering with other Federal, state and local agencies as well as the private sector to do so, it only makes sense to use that vehicle to help promote the SAFETY Act. Protecting the nation’s critical infrastructure is a daunting and extremely expensive task, and helping to ensure that SAFETY Act approved items are used will help mitigate costs and provide a measure of assurance that properly vetted items are being employed.

- **Allow for better defined marketing of SAFETY Act approvals**

One question that companies constantly face when they receive SAFETY Act approval is how they advertise their hard won victory. Initially DHS encouraged as much marketing as possible, including not objecting to the use of the official DHS seal in materials promoting an applicants receipt of SAFETY Act approval.

Over the past year DHS has altered that policy. Driven by major concerns about the misappropriation of the DHS seal generally, the Department has made clear that the official DHS seal may be used by non-Federal agencies only in very limited circumstances. This means that the use of the DHS seal in conjunction with promoting a SAFETY Act approval is no longer permissible.

One can understand the Department's rationale in these circumstances. It wants to control the use of its seal and wants to avoid the appearance of endorsing a particular technology or service. Neither are unrealistic motivations, but successful applicants should be allowed some measure of latitude in promoting the receipt of SAFETY Act protections. Currently many applicants are without significant direction on how to appropriately market their SAFETY Act approval.

Recognizing that a core purpose of the SAFETY Act is to promote the widespread deployment of anti-terror technologies, DHS should do what it can to help encourage that goal. In order to strike a balance between that objective and the Department's legitimate concern about the misappropriation of the official DHS seal, I would ask the Department to seriously consider the creation of a special logo that only SAFETY Act approved technologies and services could utilize. There is ample precedent for such a logo (including recently from the Department of Agriculture's National Organic Program), and its use would go a long way to resolve what has been an unnecessary impediment to successful applicants.

- **Better define time frames for expedited reviews**

Even after all the progress that has been made, one issue that continues to be of concern for applicants relates to expedited reviews of SAFETY Act applications. More specifically, no one is quite sure what it means to receive an "expedited" review. For some time the Department has maintained that if an application is granted an expedited review, it means that it will be moved to the top of the review pile. However, knowing that the number of applications received is still fairly low, and given the tendency of reviews to get mired in details, that has offered little comfort to applicants.

If, as the Department predicts, there will soon be a significant upswing the number of applications received, receiving a high priority review will likely be more meaningful. Similarly, the reduction by 30 days of the amount of time DHS is given to conduct a review (assuming the DHS does not grant itself numerous extensions, as it has been known to do) could be helpful here. However, there are still going to be times when parties could be significantly aided with a start to finish time frame that runs closer to 60 days than 120. DHS certainly needs and must be given time to conduct a meaningful review of an application, but it also needs to give applicants a better sense of what exactly an expedited application means. This could take the form of agreeing upon a target date for an decision to be issued or window in which an application should be returned.

CONCLUSION

Chairman Rogers, Chairman Reichert, Ranking Member Meek, Ranking Member Pascrell, and other distinguished Members of the Subcommittees, from my perspective the SAFETY Act program is one of the shining stars of the Department of Homeland Security. Its implementation has not always been the smoothest, and there are still improvements to be made, but on the whole I firmly believe that the Department should be applauded for the hard work it has put in to the program. I feel comfortable in stating that DHS has addressed many of the pressing concerns that legitimately faced applicants, and we are now in the realm of fine tuning and not major overhauls when it comes to the SAFETY Act.

This concludes my prepared remarks. I am delighted to answer any questions.